INEXCO OIL COMPANY

IBLA 75-208 Decided May 5, 1975

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying a request to reinstate oil and gas lease W 0147935.

Affirmed.

1. Administrative Practice -- Oil and Gas Leases: Suspensions -- Regulations; Generally.

   A regulatory change in the definition of the phrase "primary term" of an oil and gas lease is not an order or consent of the Secretary of the Interior to suspend operations under an oil and gas lease.

2. Oil and Gas Leases: Drilling -- Oil and Gas Leases: Extensions

   Where only preliminary steps had been taken looking toward conducting drilling operations by the expiration date of an oil and gas lease, but there were no actual drilling operations, a lease could not be extended under 30 U.S.C. § 226(e), however "primary term" of the lease in that section is defined in the regulations.

3. Oil and Gas leases: Reinstatement -- Regulations: Generally.

   A lessee's request that its oil and gas lease be reinstated because it relied on

> a regulation which has been changed is properly rejected where the lease expired by operation of law at the end of the extended term and there is no statutory authority whereby it can be reinstated.

APPEARANCES: Arthur S Brener, Esq., for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Inexco Oil Company has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated October 16, 1974, denying its request to reinstate oil and gas lease W 0147935. The decision stated in part:

> The above-numbered oil and gas lease originally issued October 1, 1962, and was extended through September 30, 1974, by drilling over the expiration date of September 30, 1972.
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> * * * * * * * * * *
>
> Since there was no drilling over the [September 30, 1974] expiration date to further extend this lease, this Office has no authority to afford relief and reinstate the lease.
>
> The letter of October 5, 1974 is treated as a protest to the expiration of the lease and the protest is hereby dismissed. This lease is held to have expired at the end of its extended term, as of midnight September 30, 1974. * * *

The lease having issued in 1962 is governed by the terms of the Mineral Leasing Act Revision of 1960, which provides in pertinent part at 30 U.S.C. § 226(e), as follows:

> Competitive leases issued under this section shall be for a primary terms of five years and noncompetitive leases for a primary term of ten years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities. Any lease issued under this section for land on which, or for which * * *, actual drilling operations were commenced prior to the end of its primary term and are

> being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities. [Emphasis added.]

The lease was a noncompetitive lease issued for a primary term of ten years. A notice of December 14, 1972, reported that as actual drilling operations were in progress at the end of the primary term, the lease continued in effect under the provisions of 43 CFR 3107.2-3. That regulation implemented the Act by providing for the two-year extension where actual drilling operations were commenced prior to the end of the lease's primary term.

The lease was not a producing lease at the end of the two-year extension following the ten-year primary term of the lease and, therefore, was not extended by production. It is also evident from appellant's statements that actual drilling operations were not being conducted on behalf of the lease on September 30, 1974, the last day of the lease's extended term. Appellant contends, however, that it and its working interest owners intended to commence actual drilling operations prior to midnight, September 30, 1974, and to diligently prosecute the same as of such time, but did not do so because they detrimentally relied upon a notice of a change in a Departmental regulation. Before further discussing appellant's arguments to support its request for equitable relief and reinstatement of its lease, we must look to the regulatory change. On August 22, 1974, the Department published at 39 F.R. 30352, a rule making amendment to the oil and gas regulations. The explanation for the amendment and the amendment are as follows:

> The purpose of this amendment is to clarify the definition of "primary term" to conform to the requirements of the Mineral Leasing Act, as amended (30 U.S.C. 181 et seq.).
>
> The present regulation 43 CFR 3107.2-1(b) defines an oil and gas lease prior to its extension by reason of production of oil or gas in paying quantities. This definition was intended to be applicable only to leases subject to section 4(d) of the Mineral Leasing Act Revision of 1960 (30 U.S.C. § 226-1(d)). A different definition is required for "primary term" under section 17(e) of the Mineral Leasing Act, as amended (30 U.S.C. 226(e)). Accordingly, 43 CFR 3107.2-1(b) is amended as set forth below.
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> * * * * * * * * * *

Subpart 3107 of Chapter II is amended as follows:

§ 3107.2-1 Terms defined.

(b) Primary term. (1) "Primary term" of leases subject to section 4(d) of the Mineral Leasing Act Revision of 1960 (30 U.S.C. 226-1(d)) means all periods in the life of the lease prior to its extension by reason of production of oil and gas in paying quantities.

(2) "Primary term" of all other leases means the initial term as set forth in the lease. For a competitive lease issued under section 17 of the Mineral Leasing Act, as amended (30 U.S.C. 226(e)), this means five years and for a noncompetitive lease issued under that section this means ten years.

Thereafter, by a notice dated October 3, 1974, and published October 9, 1974, 39 F.R. 32348, the notice published August 22, 1974, was "rescinded and the regulation 43 CFR 3107.2-1(b) in effect prior to that notice * * * reinstated." The state reason for this action was to republish the rule as proposed rule making and to give the public an opportunity to comment on the proposal.

Appellant contends generally that the regulatory change is invalid. It asserts that the definition of "primary term" is contrary to long-standing administrative interpretation because the regulation was not amended earlier by the Department and because Congress took no action after the 1960 Act. It notes, however, that an Opinion by the Assistant Solicitor, Branch of Minerals, dated February 5, 1963, had pointed out that the regulation was inconsistent with the meaning of "primary term" previously set forth as dictum in a Solicitor's Opinion, M-36605, 67 I.D. 357 (September 23, 1960). 1/ It also asserts that the changed regulation is contrary to the Mineral Leasing Act Revision of 1960, because there is no indication that Congress intended the phrase "primary term" to have a different meaning in the contexts of 30 U.S.C. § 226(e) and 30 U.S.C. § 226-1(d).

1/ See also a Solicitor's Opinion of April 9, 1947, 59 I.D. 517, (1974), interpreting section 17 of the Mineral Leasing Act, as amended by the Act of August 8, 1946, 60 Stat. 950, where an extension was allowed upon payment of compensatory royalties during the "primary term of the lease" to mean only the initial 5-year term of the lease.

Appellant further contends the regulation, as first issued as final rule making, was improperly adopted under the Administrative Procedure Act, 5 U.S.C. § 553 (1970), and was invalid. It also contends the regulation was an abuse of administrative discretion, primarily because of the delay in changing the definition after the Mineral Leasing Act Revision of 1960. It contends that it relied on the old definition until publication of the change on August 22, 1974. At that time it had to choose between disregarding the new published regulation, which it considered invalid, and taking the risk of challenging it, which could result in a "severe economic hardship," or following the new regulation, although it believed it to be "clearly erroneous and an abuse of discretion." Appellant argues its election not to violate the mandates of the new regulation was the only prudent course of action, and by doing so, it "has suffered injury and irreparable damage by its prudence," and therefore it is entitled to equitable relief--reinstatement of the lease--because of its detrimental reliance. It further argues, apparently alternatively, that the lease did not terminate because the change in the regulation was, in effect, an order of suspension within the meaning of 30 U.S.C. § 226(f) which provides, inter alia, that no lease issued under that section "shall expire because operations or production is suspended under any order, or with the consent, of the Secretary."

Appellant thus presents two alternatives. One, that the lease has not expired by operation of law. Two, that the lease has expired but should be reinstated for equitable reasons. We see no basis for either of these alternatives.

[1] First, we must conclude that the lease has expired by operation of law. We cannot accept appellant's argument, in effect, that the change in the regulation can be construed to be an order or consent of the Secretary of the Interior to suspend lease operations under 30 U.S.C. § 226(f). To illustrate the fallacy of this contention let us suppose a well had been drilled on the lease by August 22, 1974. If the published change in the regulation constituted a suspension order, a lessee could not thereafter proceed with its operations to bring the well to production, assuming oil or gas were found. No one could seriously argue that had a well been brought to production prior to September 30, 1974, the lease would be deemed suspended as of August 22, rather than extended by reason of production thereafter, and the operations thereafter would be in violation of a suspension order. The change in the definition of "primary term," an interpretative regulation, in no way, either expressly or impliedly, constituted an order or consent to suspend operations on a lease. Aside from

additional fallacies in this contention by appellant, we point out that under regulation 43 CFR 3103.3-8(a) no suspension will be granted for any lease "in the absence of a well capable of production on the leasehold, except where the Secretary directs a suspension in the interest of conservation." Duncan Miller, 6 IBLA 283 (1972); Texaco, Inc., 68 I.D. 194 (1961). The factual prerequisites of this regulation were not met in this case and, therefore, a suspension would not have been warranted in any event. Id., cf., Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1974); Robert E. Mead, 62 I.D. 111 (1955); H. K. Riddle, 62 I.D. 81 (1955).

Second, we see no basis for reinstating the lease. Appellant seeks acceptance of its arguments concerning the proper interpretation of "primary term" both ways. It contends that the old, rather than the changed, regulation is the proper interpretation of the statute and should govern, but wishes to excuse its noncompliance with the factual precondition for an extension based on actual drilling operations because of the allegedly invalid regulatory change. This is not an acceptable excuse.

[2] Even, assuming arguendo, that a second 2-year extension could be permitted under 30 U.S.C. § 226(e), if "actual drilling operations were commenced prior to the end of its primary term," as defined in the prior regulation, appellant had not commenced such actual drilling operations within the meaning of that term prior to midnight September 30, 1974. The term "actual drilling operations" are defined in 43 CFR 3107.2-1(a) to include "not only the physical drilling of a well but the testing, completing or equipping of such well for the production of oil or gas." Further, 43 CFR 3107.2-2 provides:

> Actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil or gas could be expected to make in that particular area, given existing knowledge of geologic and other pertinent facts.

Accord, Hondo Oil and Gas Company, A-30216 (January 11, 1965). By appellant's statements it is clear that, at most, it had only taken preliminary steps looking toward commencement of drilling operations, but had not commenced such operations by the end of the lease's extended term. Mere preparatory work preliminary to actual drilling operations is not sufficient. Michigan Oil Co., 71 I.D. 263 (1964). Thus, even were there no other problems involved here, appellant could not be entitled to a two-year

extension by virtue of the extension provided under 30 U.S.C. § 226(e) because there were no actual drilling operations commenced prior to the end of the lease's primary term, however primary term is defined. Cf. Alta Vista Resources, Inc., 10 IBLA 45 (1973).

Appellant's contentions that the new regulation is invalid have been mooted by subsequent events which make it unnecessary to answer those contentions in any detail. The new regulation was changed to proposed rule making. Appellant, along with the general public, was given the opportunity to object to the proposal and present reasons why it was not in accord with the Mineral Leasing Act Revision of 1960. Any arguments to that effect were considered by the Department but rejected. By a notice dated March 12, 1975, published March 19, 1975, 40 F.R. 12507, the amendment of 43 CFR 3107.2-1(b), as published originally August 22, 1974, and republished as proposed rule making on October 9, 1974, was adopted as final rule making effective March 31, 1975. The notice indicated that all comments had been considered, but that the Department found it necessary to publish the amendment as originally proposed without change.

The definition of primary term under 30 U.S.C. § 226(e) is now a final rule of the Department. We add our own view that the new definition is the proper definition in view of the express language in 30 U.S.C. § 226(e) referring to a "primary term of ten years." Furthermore, we find support for this view in the legislative history of the Mineral Leasing Act Revision of 1960, in the following statement from the Report of the House Committee on Interior and Insular Affairs discussing the change of the term on the noncompetitive leases:

> Substitution of a single 10-year primary lease term in the case of noncompetitive leases (i.e. leases held on lands which are not within the known geological structure of a producing field) for the present 5-year term with right of renewal will it is believed, simplify administration and reduce costs both to the Government and the industry.
>
> Similarly, allowance of an added 2-year term for existing and future oil and gas leases, if actual drilling is being diligently prosecuted at the end of the primary term, will provide impetus toward exploration for oil and gas and reward those who do so diligently. The added period it is believed, will not result in an

> excessively long overall leasing period in view of the time required, under present conditions, to block up areas for exploration, obtain financing, and carry on scientific investigations. [Emphasis added.]

H.R. Rep. No. 1401, 86th Cong., 2d Sess. at p. 5.

It is evident that Congress envisaged under this provision only one 2-year extension by virtue of actual drilling operations at the end of the primary term of ten years and did not contemplate possible continual 2-year extensions whenever there were actual drilling operations at the end of previous 2-year extensions by drilling.

[3] Appellant's request for equitable relief boils down to an objection to the Department's failure to change the regulation defining "primary term" for so many years. We offer no excuse for the tardiness of this change. Obviously the Solicitor's Office and others were long aware that the regulation was not in accord with the Congressional intent in the Mineral Leasing Act Revision of 1960. Solicitor's Opinion of September 23, 1960, at 67 I.D. 360. It is regrettable that the delay was so long. Nevertheless, appellant has pointed to no statutory authority, other than its arguments concerning a suspension under 30 U.S.C. § 226(f), which would authorize administrative reinstatement of this lease. Where leases have terminated by operation of law because a lessee failed to submit the total rental payment due, even though the payment was in accord with an erroneous billing by Departmental employees, it has been held there is no authority to reinstate a lease without statutory authority to do so. Billy Mathis, A-30512 (July 6, 1966). Generally, delays of Departmental officials to do their duty cannot operate to create rights not authorized by statute. See 43 CFR 1810.3 and Marathon Oil Co., 16 IBLA 298, 81 I.D. 447 (1974) (holding that past acceptance of lower royalty payments did not estop the Government from demanding a recalculation of the royalties and payment of additional money owed the Government). Cf. Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) (the court holding a lease applicant is not bound by his failure to comply with one part of an ambiguous BLM decision). Accordingly, we see no basis for reinstating appellant's lease which expired by operation of law at the end of its extended term.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

I am impelled to the same conclusion as is reached in the main opinion, but wish to point out an additional basis for the soundness of that conclusion.

The pertinent statutory provision, 30 U.S.C. § 226(e) (1970), provides:

> (e) Competitive leases issued under this section shall be for a primary term of five years and noncompetitive leases for a primary term of ten years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities. Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities. (Emphasis supplied.)

The pertinent regulation, 43 CFR 3107.2-3 (1973), in force purportedly until August 22, 1974, read as follows:

> § 3107.2-3 Period of extension.
>
> Any lease on which actual drilling operations, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time, shall be extended for 2 years and so long thereafter as oil or gas is produced in paying quantities. (Emphasis supplied.)

Thus one of the primary questions to be resolved is the meaning of "primary term" for a lease issued under sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(e) (1970).

The regulation 3107.2-1(b) (1973) provided:

> Primary term. (1) "Primary term" * * * means all periods in the life of the lease prior to its extension by reason of production of oil and gas in paying quantities.

However, the regulation, 43 CFR 3107.2-1(b), which was in force ostensibly from August 22, 1974 until October 3, 1974, and which was readopted and published on March 19, 1975, 40 F.R. 12507, as final rulemaking reads as follows:

> § 3107.2-1 Terms defined.
>
> * * * * * * * * *
>
> (b) Primary term. (1) "Primary term" of leases subject to section 4(d) of the Mineral Leasing Act Revision of 1960 (30 U.S.C. 226-1(d) means all periods in the life of the lease prior to its extension by reason of production of oil and gas in paying quantities.
>
> (2) "Primary term" of all other leases means the initial term as set forth in the lease. For a competitive lease issued under section 17 of the Mineral Leasing Act, as amended (30 U.S.C. 226(e), this means five years and for a noncompetitive lease issued under that section this means ten years.

Thus it is clear that appellant cannot be granted relief if it is determined that, after the stated termination date of its lease, the primary term had already expired. It is obvious that as early as September 23, 1960, the Solicitor recognized that the earlier regulation was contrary to law, saying at 67 I.D. 357, 360 as follows:

> Considered wholly apart from the 1960 act, I find no basis for saying that "primary term" includes anything more than the initial term of years specified in the lease. Turning now to the act; it is clear that the phrase as used in section 17(e) means the initial 10-year term of a noncompetitive lease and the initial 5-year term of a competitive lease and no more or less. Because of the amendment of section 30(a) of the Mineral Leasing Act to deny an extension of the undeveloped, segregated portions of a lease for two years from the date of any partial assignment made during extension periods for reasons other than production, it appears that Congress intended at least as to future leases, that no lease should continue in being for more than 12 years without production either on the lease or in a unit to which it was committed. This of course has some bearing on the question before us. It is not conclusive, however, because leases issued prior to the act were expressly excluded. (Emphasis supplied.)

It is indeed unfortunate that some 14 years passed before the regulation was amended to conform to the law. But a regulation demonstrably contrary to law cannot have any vitality. See Helvering v. Sabine Transp. Co., 318 U.S. 306, 311-312 (1943); cf. Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931). I am therefore impelled to the conclusion that on September 30, 1974, there was no regulation in force governing the meaning of "primary term." Appellant must look to the law, i.e., 30 U.S.C. 226(e) (1970) for any comfort it might afford him. It simply does not -- it permits only one extension for drilling at the end of the stated term of the lease, i.e. ten years.

Insofar as appellant asserts an equitable estoppel against the United States, such estoppel will not lie where there would be a detrimental effect on national policy. The retention of a lease by a lessee for over 12 years without production is clearly antithetical to the public interest. Cf. Gestuvo v. Immigration and Naturalization Service, 337 F. Supp. 1093 (C. D. Cal. 1971). See 41 FORDHAM L. REV., 140-8 (1972).

Frederick Fishman
Administrative Judge